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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. _____

72-1552

HOWARD EDELSTEIN - - - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. _____

HOWARD EDELSTEIN - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Howard Edelstein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on April 19, 1973.

OPINION BELOW

The petitioner was tried by a jury in the United States District Court for the Western District of Kentucky and convicted of conspiring against the United States in violation of Title 18 USC, Sec. 371; making a destructive device without having filed a written application form in violation of Title 26 USC, Sec. 5822; possessing unregistered firearms in violation of Title 26 USC, Sec. 5861(d) and Sec. 5871; and damaging and

destroying personal property used in and affecting interstate commerce, in violation of Title 18 USC, Sec. 844(i), as charged in the four counts of the indictment (Appendix A, *infra,* pp. 11-12).

The opinion of the United States Court of Appeals affirmed the judgment of the trial court (Appendix B, *infra,* p. 13).

JURISDICTION

The United States Court of Appeals rendered an opinion on April 19, 1973, affirming the judgment of the trial court (Appendix B, *infra,* p. 13). The jurisdiction of this court is invoked under 28 USCA 1254(1).

QUESTION PRESENTED

Whether the admission of evidence that co-conspirator Ziler had pleaded guilty to the conspiracy charge for which the petitioner was being tried and the admission of evidence of prior offenses ascribable to petitioner Edelstein only by impermissible innuendo, denied the petitioner a fair trial.

THE STATUTORY PRINCIPLES INVOLVED

The provisions of the statute which this case involves are Title 18 USC, Sec. 371, Title 26 USC, Sec. 5822, Sec. 5861(d), 5861(f) and Sec. 5871, and Title 18 USC, 844(i), set forth in Appendix, *infra,* pp. 14-16.

STATEMENT

On March 29, 1971 the building of Heid Printing Company, 2609-2611 Portland Avenue, Louisville, was substantially damaged by an explosion. Investigation revealed that the explosive device used to damage the building was a "home-made" device. An indictment in four counts was returned by the grand jury in the Western District of Kentucky against Howard Edelstein, petitioner, Howard Gordon Ziler and Boyd Smallwood, charging them with having conspired together, with each other, and with Clinton R. Oates, Jr., Paul Alvin Linney, Timothy D. Cent, Calvin Mitchell Clark and George Clifton Compton, named as co-conspirators, but not as defendants, and with diverse and other persons to the grand jury unknown, to commit the following offenses: (1) to knowingly make a destructive device in violation of Chapter 53, Internal Revenue Code of 1954, as amended, in violation of 26 USC, Sec. 5861(f); (2) To knowingly possess such destructive device in violation of 28 USC, Sec. 5861(d); and (3) To knowingly and maliciously damage, by means of an explosive, a building and personal property used in an activity affecting the interstate commerce, in violation of 18 USC 844(i).

Various overt acts were alleged in Count I. The second, third and fourth counts of the indictment charged the petitioner, Howard Edelstein and Howard Gordon Ziler, with knowingly making, possessing and using such an explosive device in violation of the enumerated statutes.

The petitioner is the only defendant who went to trial on October 20, 1972. The indictment was dismissed as to all others except Ziler, who pleaded guilty on April 17, 1972. Clinton R. Oates, Jr., a co-conspirator, but not named as a defendant in the indictment, was granted immunity. The court imposed a sentence of five years on the petitioner as to Count I and imprisonment of ten years in each of the other three counts. The three terms are to run concurrently at the conclusion of the five year term, making the sentence fifteen years.

ARGUMENT

Whenever a defendant's behavior that obviously is vicious, can be proved to be a violation of a criminal statute only with great difficulty, the effort to bridge the gap is apt to produce errors that result in a denial to the defendant of a fair trial. The greatest danger of this exists in the charge of conspiracy. While the prosecution should first establish prima facie the conspiracy and identify the conspirators after which evidence of acts and declarations of each in the course of its execution, are admissible against all, the order of proof of such a sprawling charge is difficult for a judge to control.

The evidence to prove conspiracy is generally, admissible upon the assumption that a conspiracy existed.

Clinton R. Oates, Jr., a co-conspirator, but not named as a defendant in the indictment, and Howard Gordon Ziler, who was indicted as a co-conspirator, testified that they set and detonated the explosive, causing the damage to the Heid building. Oates, who

had been granted immunity, and the only witness who adduced testimony directly linking the petitioner with the charge, testified in detail as to his activities in assembling the material and making the explosive device which, he testified, was at the instance and request of petitioner Edelstein.

A prejudicial error was committed in permitting the prosecution to prove that the co-conspirator Ziler had pleaded guilty to the same charge contained in the indictment for which this petitioner was being tried. The harmful and prejudicial effects of receiving in evidence proof of the guilty plea of a co-conspirator has been regarded by the courts as inadmissible and constitutes "plain error" under Rule 52(b) F. R. Crim. P., in a separate trial of another conspirator to support the prosecution's contention of the latter's complicity. *United States* v. *Toner* (3 Cir. 1949), 173 F. 2d 140; *United States* v. *Hall* (2 Cir. 1950), 178 F. 2d 853; *Trussell* v. *United States* (6 Cir. 1960), 278 F. 2d 478; *Babb* v. *United States* (5 Cir. 1955), 218 F. 2d 538.

In the case of *United States* v. *Harrell* (5 Cir. 1970), 436 F. 2d 606, there will be found a full discussion of certain circumstances under which pleas of guilty by a co-conspirator as to either conspiracy or the substantive offense, will affect a defendant's substantial rights and amount to "plain error" under Rule 52(b) F. R. Crim. P. This case undoubtedly presents such circumstances as would affect this petitioner's substantial rights and amounts to "plain error."

In the *Harrell* case, two defendants were charged with conspiring to violate the revenue laws between

September 5 and September 22, 1968. Norris entered a guilty plea on March 29, 1969, several months after the alleged conspiracy had terminated, and several months before Harrell's trial. (In the instant case Ziler pleaded guilty on April 17, 1972 and the Petitioner was tried Oct. 20, 1972.) Norris testified in defense of Harrell, but upon cross-examination he admitted pleading guilty to all counts of the indictment "except the still."

The Court pointed out that Norris' plea of guilty, coming as it did, *after* the conspiracy was ended, was not admissible. But the Court did not rest its decision on that point alone. The following excerpt from *Harrell* is particularly apposite here:

> "Our discussion of the prejudicial effect of permitting testimony as to Norris' prior pleas of guilty should be clearly understood as limited to the facts before us. We are not here at all concerned with the case where proof of a co-defendant's guilty plea is offered for a recognized evidentiary purpose, and an appropriate accompanying instruction is given limiting the jury's consideration of the guilty plea to the evidentiary purpose for which the evidence as to it was received. No purpose was stated, none was required by the trial court to be stated, when the question of Norris' prior guilty pleas was introduced. The legitimate presumption is that the evidentiary purpose was the general one of demonstrating Harrell's guilt of the offenses for which he was on trial.
>
> * * * * * * *

"That was all. Nothing was said to dispel the predictably certain reasoning a juror could be expected to indulge in: If Norris, as admitted, was guilty of conspiring with Harrell, how then could Harrell be other than guilty of conspiring with Norris? Jurors equally with others are aware that 'it takes two to tango'.

"With respect to Harrell's guilt or innocence, Norris' plea of guilty was no more and no less than an inadmissible hearsay statement—made long after the conspiracy had ended—* * * (Id. 436 F. 2d, p. 614)

The court's instruction did not reduce the error herein to a "harmless error."

The trial court permitted testimony to be received dealing with earlier offenses under the exception to the general rule which permits evidence of such conduct when intent, motive or lack of mistake are in issue. Although the court gave cautionary instructions (Appendix H, *infra,* pp. 16-17), there was no issue of intent, motive or lack of mistake involved in this trial.

The court, by permitting evidence of prior offenses to be introduced, when intent, motive or lack of mistake were not in issue, the cautionary instruction which the Court gave, increased the prejudicial effect of the incompetent evidence and placed the imprimatur of the Court upon the competency of the evidence, by instructing the jury that it could make a determination that the earlier offenses were established by "evidence which is clear and conclusive."

The evidence of prior offenses introduced in this action did not address itself to the resolution of any

issue. The resulting effect of the evidence was deeply prejudicial to this petitioner.

During the course of the trial, prejudicial hearsay evidence was admitted over petitioner's objection. During the testimony of Timothy D. Cent, one of the co-conspirators not named as a defendant, in response to a question if he had received any impression as to what they (Clinton R. [Randy] Oates and Paul Alvin Linney) wanted the dynamite for, stated as follows:

> "I got the impression over several discussions with Paul that one time when Randy Oates was present, that there were two parties unknown to me that were feuding or had some dispute or altercation in the West End of Louisville and * * * one of them was going to try and dynamite some building of the other's (Tr. Ev., pp. 5, 6, Appendix to Brief for Defendant-Appellant, Sixth Circuit, pp. 34A-35A)."

In another instance, co-conspirator Ziler related that Oates told him he was planning the dynamite, not for himself, but for a "friend" (Tr. Ev., p. 12, Appendix to Brief for Defendant-Appellant, Sixth Circuit, p. 38A). Ziler was then permitted to say that Oates told him

> "* * * He was a druggist or something or other, a pharmacist, selling drugs." (Tr. Ev., pp. 12-13, Appendix to Brief for Defendant-Appellant, Sixth Circuit, p. 38A.)

This Court, in the case of *Dutton* v. *Evans,* 91 S. Ct. 210, 400 U. S. 74, at p. 81, stated as follows:

"It is settled that in federal conspiracy trials the hearsay exception that allows evidence of an out-of-court statement of one conspirator to be admitted against his fellow conspirators applies only if the statement was made in the course of and in furtherance of the conspiracy * * *". Id. 400 at page 81.

CONCLUSION

While the serious nature of the offenses charged is not overlooked, the question raised here as to whether the proof of the guilty plea of a co-conspirator permitted to be introduced to support the prosecution's contention of the defendant's complicity, amounts to "plain error" under Rule 52(b) F. R. Crim. P., involves matters which is important for the protection of the rights of all citizens. Although this record shows the behavior of the participants to be sordid, the accumulation of fundamental errors committed has denied to this petitioner a fair trial.

It is respectfully submitted that a writ of certiorari should be granted.

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APPENDIX

APPENDIX

APPENDIX A

JUDGMENT—Entered October 28, 1972

On this 28th day of October, 1972 came the attorney for the government and the defendant appeared in person and employed counsel, Frank E. Haddad, Jr.

It Is ADJUDGED that the defendant has been convicted upon his plea of NOT GUILTY by a jury of the offenses of conspiring against the United States in violation of Title 18, Section 371, U.S. Code, making a destructive device without having filed a written application form in violation of Title 26, Section 5822, U.S. Code, possessing unregistered firearms in violation of Title 26, Sections 5861(d) and 5871, U. S. Code, and damaging and destroying personal property used in and affecting interstate commerce, in violation of Title 18, Section 844(i) U.S. Code, as charged in the four counts of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted. Presentence report was furnished by the probation office and read by the Court.

It Is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

FIVE YEARS as to Count 1 of the Indictment.

TEN YEARS as to Count 2 of the Indictment; TEN YEARS as to Count 3 of the Indictment; TEN YEARS as to Count 4 of the Indictment. Counts 2, 3 and 4 shall be served concurrently, each with the other, but CONSEC-

UTIVE to Count 1 of the Indictment, for a total sentence of FIFTEEN YEARS to be served by the defendant.

It Is ADJUDGED that as to Count 1 of the Indictment, the defendant shall become eligible for parole at such time as the Board of Parole may determine as provided in Title 18, Section 4208 (a)(2), United States Code.

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JAMES F. GORDON
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-2210

UNITED STATES OF AMERICA, - - *Plaintiff Appellee*

v.

HOWARD EDELSTEIN, - - *Defendant-Appellant*

ORDER—Filed April 19, 1973

Before WEICK, EDWARDS and CELEBREZZE, Circuit Judges.

Upon consideration of Edelstein's appeal from his conviction in the District Court on the charge of conspiracy to make, possess and damage with, explosives, a building involved in interstate commerce, we are of the opinion that the trial court did not commit prejudicial error in permitting the Government to prove that one of the co-conspirators who testified at the trial pleaded guilty to the charge; nor do we find any error in the admission or evidence of similar acts. We further find no prejudicial error in the trial and conviction of Edelstein.

It is therefore ORDERED that the judgment of conviction of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT.

(s) James A. Higgins
Clerk

APPENDIX C

TITLE 18 USC

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX D

TITLE 26 USC

§ 5822. Making

No person shall make a firearm unless he has (a) filed with the Secretary or his delegate a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary or his delegate;

* * * * * * *

APPENDIX E

TITLE 26 USC

§ 5861. Prohibited acts

It shall be unlawful for any person—

* * * * * * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

* * * * * * *

(f) to make a firearm in violation of the provisions of this chapter; or

* * * * * * *

APPENDIX F

TITLE 26 USC

§ 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become eligible for parole as the Board of Parole shall determine.

APPENDIX G

TITLE 18 USC, SEC. 844(i)

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

APPENDIX H

CAUTIONARY INSTRUCTION

BY THE COURT: Now, Ladies and Gentlemen; I want to give you this special cautionary instruction; at this time, and of course at the conclusion of the case I will repeat it again, the fact that Mr. Edelstein may allegedly have committed some offense at some time other than that charged in the indictment is not evidence or proof whatsoever that he did or caused the thing to be done charged in the indictment on trial here, even though both offenses may be of a similar nature.

Evidence as to an earlier offense, allegedly, of a like nature may not therefore be considered by the Jury in determining the guilt or innocence of the accused as to the act charged in the indictment, nor may such evidence be con-

sidered for any other purpose whatever unless the Jury first finds from the evidence in the case on trial, standing alone, has established the guilt of the accused.

If the Jury, at the conclusion of this case, should find beyond a reasonable doubt from all of the other evidence in the case that the accused did the acts charged in the indictment, then you may consider evidence of an alleged earlier offense of a like nature in determining the intent, motive, or state of mind with which the accused did act as charged in the indictment, and where all of the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the Jury may then, if it does, but is not obligated to draw the inference and find that the doing of the act charged in the indictment and, in the doing thereof, the accused acted willfully and with specific intent and not because of mistake, accident or other innocent reason.

Now, this precautionary instruction has to do with the testimony just completed by Mr. Heid as to certain alleged explosive occurrences that have occurred in the not too remote time, but in the last three or four years prior to trial.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1552

HOWARD EDELSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the district court erred in permitting petitioner's accomplice, who was a government witness, to testify that he (the accomplice) had pleaded guilty to the charges against him in the indictment. Petitioner also challenges the admissibility of the evidence of petitioner's prior similar acts and the admission of statements of co-conspirators.

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on a four-count indictment charging conspiracy, in violation of 18 U.S.C. 371; the making of a destructive device without having filed a written application form as required by 26 U.S.C. 5822, in violation of 26 U.S.C. 5861(f) and 5871; the possession of

unregistered firearms, in violation of 26 U.S.C. 5861(d) and 5871; and the damaging of a building and personal property used in and affecting interstate commerce, in violation of 18 U.S.C. 844(i). He was sentenced to five years' imprisonment on the conspiracy count, the term to run consecutively with concurrent terms of ten years' imprisonment on counts two, three and four. The court of appeals affirmed (Pet. App. B.).

1. On March 29, 1971, the Heid Printing Company was substantially damaged by a dynamite explosion (I Tr. 28-30, 61).[1] A mechanism found on the floor of the building appeared to be a timing device (I Tr. 30). After interviewing Mr. Heid, the owner of the building (I Tr. 33), an arson investigator interviewed petitioner, a pharmacist and neighbor of Mr. Heid, who stated after receiving *Miranda* warnings that "It [the explosion] couldn't have happened to a nicer guy" (I Tr. 35-36, 51).

At trial Clinton Oates, a life insurance salesman who was also involved in a family fireworks business, testified that he had known petitioner since 1967, when petitioner began to purchase fireworks from him (I Tr. 69). Approximately every three months from 1967 through 1971, petitioner purchased six to twelve progressively larger salutes (I Tr. 72-74). In June 1969, petitioner told the salesman that he wanted to destroy the printing company and at that time he purchased some fifteen inch salutes which were five inches in diameter and about six and one half inches long (I Tr. 74-75).

The owner of the printing company testified that on June 3, 1969, someone had thrown an explosive de-

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[1] "I Tr." and "II Tr." refer to the transcript of the proceedings at trial, contained in two volumes paginated concurrently.

vice onto the sidewalk in front of his building, which blew out half of the plate glass (II Tr. 66). He further testified that in February 1969 petitioner threw an explosive device onto the driveway of his home causing damage (II Tr. 67-68). He also stated that in October 1970 petitioner threw an explosive device into his back yard which left a hole three feet wide and five inches deep (II Tr. 60-61, 100-101). On other occasions petitioner was observed by Mr. Heid and a neighbor throwing firecrackers as he passed the Heid house (II Tr. 81, 84-88, 93).

Following the preceding testimony of Mr. Heid, the court gave the following cautionary instruction (II Tr. 64-65):

> Now, Ladies and Gentlemen: I want to give you this special cautionary instruction; at this time, and of course at the conclusion of the case I will repeat it again, the fact that Mr. Edelstein may allegedly have committed some offense at some time other than that charged in the indictment is not evidence or proof whatsoever that he did or caused the thing to be done charged in the indictment on trial here, even though both offenses may be of a similar nature.
>
> Evidence as to an earlier offense, allegedly, of a like nature may not therefore be considered by the Jury in determining the guilt or innocence of the accused as to the act charged in the indictment, nor may such evidence be considered for any other purpose whatever unless the Jury first finds from the evidence in the case on trial, standing alone, has established the guilt of the accused.
>
> If the Jury, at the conclusion of this case, should find beyond a reasonable doubt from all of the

other evidence in the case that the accused did the acts charged in the indictment, then you may consider evidence of an alleged earlier offense of a like nature in determining the intent, motive, or state of mind with which the accused did act as charged in the indictment, and where all of the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the Jury may then, if it does, but is not obligated to draw the inference and find that the doing of the act charged in the indictment and, in the doing thereof, the accused acted willfully and with specific intent and not because of mistake, accident or other innocent reason.

The evidence also showed that in January 1971 petitioner again stated that he wanted the printing company destroyed and asked Oates if he would find someone to do the job (I Tr. 93-94). Oates solicited one Gordon Ziler, who agreed to dynamite the building (I TR. 94). Oates received an envelope containing $1,000 from petitioner and proceeded to steal thirty-five to forty sticks of dynamite and six or eight caps from a construction site (I Tr. 96-97, 102). Thereafter, petitioner gave Oates an additional $3,000 of which $1,000 was to be used by Oates for his expenses (I Tr. 103-105). Oates gave the explosives to Ziler along with wire, batteries and a timing device (I Tr. 106-108). Together they assembled the bombing device and placed it in the building (I Tr. 111-112, 114). On the morning following the bombing Oates called petitioner and stated that he needed $600 to pay Ziler (I Tr. 117). That afternoon petitioner gave Oates the money (I Tr. 118). After the bombing petitioner stated to Oates that he "wanted the place completely destroyed this time, or Mr. Heid killed" (I Tr. 118-119).

Howard Gordon Ziler also testified for the government. He too admitted his complicity in the offense and that he had pleaded guilty to the charge on which petitioner was being tried (II Tr. 8).

The court instructed the jury that the testimony of Oates and co-defendant Ziler, who admittedly took part in the crime of which defendant was charged, should "be received with caution and you should not accept it unless it so far harmonizes with all of the other testimony in the case as to leave in your mind no reasonable doubt as to its truth" (II Tr. 220).

2. Petitioner contends that it was "plain error" to permit Ziler, the co-conspirator, to testify that he (Ziler) had pleaded guilty to the charge for which petitioner was indicted. This claim is without merit. It is well settled that the government is entitled to elicit whatever information could be damaging to its witnesses' credibility, "such as a guilty plea to an indictment, 'to prevent the defense from creating a misleading impression, or the jurors from thinking, that the Government is seeking to keep something from the jury.'" *United States* v. *Rothman,* 463 F. 2d 488, 490 (C.A. 2), certiorari denied, 409 U.S. 956; citing *United States* v. *Del Purgatorio,* 411 F. 2d 84, 87 (C.A. 2); *United States* v. *Freeman,* 302 F. 2d 347, 350 (C.A. 2), certiorari denied, 375 U.S. 958; and see *United States* v. *Crosby,* 294 F. 2d 928, 948 (C.A. 2), certiorari denied *sub nom. Mittleman* v. *United States,* 368 U.S. 984.

Moreover, since the witness Ziler testified to his complicity in the offense, it is difficult to see how petitioner could possibly have been prejudiced by the further admission that Ziler had formally pleaded guilty. On the contrary, petitioner's counsel exploited the evidence

regarding Ziler's cooperation and plea by suggesting to the jury that his testimony was given for the purpose of obtaining "leniency" (II Tr. 39).

In *United States* v. *Harrell*, 436 F. 2d 606 (C.A. 5), upon which petitioner principally relies, a co-defendant pleaded guilty to a conspiracy count, which named the defendant as a co-conspirator, and testified as a witness for the *defendant*. Although the co-defendant had insisted at the time he pleaded guilty that the defendant was not one of his co-conspirators as charged in the indictment, he was permitted to testify at trial—without explanation—that he had pleaded guilty to the conspiracy count. In holding this to be plain error, the court of appeals stated (436 F. 2d at 614):

> * * * Norris and his counsel repeatedly pointed out that he was pleading guilty to conspiring with the "distilling fellows", not with Harrell. But this attempt to limit the nature of the plea, or more properly the nature of the admissions implicit in it, was never called to the jurors' attention during the trial. The impression was left that somehow the plea of guilty was inconsistent with Norris' testimony at trial: that proof of the plea of guilty was in the nature of impeachment of Norris' trial testimony, or worse yet, that it somehow proved Harrell's guilt. No limiting instruction was given when the evidence as to the guilty plea was received.

Obviously, nothing comparable occurred here.

The remaining cases upon which petitioner relies also differ significantly from this case. They mainly involve instances where a co-defendant has pleaded guilty immediately prior to trial or in the midst of trial. The co-defendants in those cases did not testify as witnesses for the government, and the failure of the district courts

in these circumstances to grant the defendants' requests for limiting instructions was held to constitute prejudicial error. See, *e.g.*, *United States* v. *Toner*, 173 F. 2d 140 (C.A. 3); *United States* v. *Hall*, 178 F. 2d 853 (C.A. 2); *Trussell* v. *United States*, 278 F. 2d 478 (C.A. 6).[2]

3. Petitioner further claims that the evidence of other criminal acts, that is, the throwing of explosives at the Heid Printing Company and the Heid home, unduly prejudiced him. Proof of other crimes, however, is admissible to show motive, intent, knowledge or common scheme. *E.g.*, *United States* v. *Turner*, 423 F. 2d 481 (C.A. 7), certiorari denied, 398 U.S. 967; *United States* v. *Carter*, 401 F. 2d 748 (C.A. 3), certiorari denied, 393 U.S. 1103; *Robinson* v. *United States*, 366 F. 2d 575 (C.A. 10), certiorari denied, 385 U.S. 1009. In this trial, knowledge and intent were the key elements to be proved. Moreover, as we have detailed, the court's instruction limiting the effect of this testimony adequately protected petitioner's rights.

4. Petitioner also claims that the statements of two co-defendants were inadmissible hearsay as to him. Co-conspirator Cent testified that based on conversations

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[2] *Babb* v. *United States*, 218 F. 2d 538 (C.A. 5), is the only case cited by petitioner in which the co-conspirator both pleaded guilty and testified for the prosecution. While we believe that the court of appeals there erroneously applied holdings rendered in the contexts described above in concluding that it was error to have elicited such testimony, the holding in *Babb* does not conflict with the decision here. Unlike the instant case, the defendant in *Babb* specifically requested a limiting instruction and the reversal of the conviction was predicated on the failure of the district court to so charge the jury (218 F. 2d at 542). The failure of the district court — in the context of this case — similarly to instruct the jury *sua sponte* on the purpose of the testimony was not plain error. See *United States* v. *Kimbrew*, 380 F. 2d 538, 540 (C.A. 6).

he had with Oates he formed the impression that there were two unknown parties who "were feuding" and "that one of them was going to try and dynamite some building of the other's" (II Tr. 5, 6). Co-conspirator Ziler testified that Oates told him that he was planning the dynamiting for a friend who was a pharmacist (II Tr. 12-13). These statements were made during the conspiracy to commit the offense and in furtherance thereof, and were thus admissible under the co-conspirator exception to the hearsay rule as explained in *Dutton* v. *Evans,* 400 U.S. 74, 81, on which petitioner mistakenly relies (Pet. 9). Moreover, the alleged hearsay declarant (Clinton Oates) testifed at the trial and was available for cross-examination. As a result, any prejudice to petitioner's Sixth Amendment right of confrontation—which was one of the principal points of contention in *Dutton* v. *Evans, supra*—was eliminated. See *Nelson* v. *O'Neil,* 402 U.S. 622, 627.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1973.